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IN THE

Supreme Court of the United States

No. 591

JAMES E. COURTIN,

Appellant,

versus

LLEWELLYN SHARP, IV,

Appellee.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
for the Fifth Circuit

James E. Courtin,
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840 Saratoga Building
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IN THE
SUPREME COURT OF THE UNITED STATES

No.

JAMES E. COURTIN,

Appellant,

versus

LLEWELLYN SHARP, IV,

Appellee.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
for the Fifth Circuit

Petitioner, James E. Courtin, prays that a writ of certiorari be issued to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit entered July 27, 1960, said opinion and judgment affirming the judgment of the District Court of the United States for the Eastern District of Louisiana in favor of Llewellyn Sharp, IV, plaintiff in the Trial Court.

Opinions Below

The opinion of the United States Court of Appeals for the Fifth Circuit, No. 18223, is attached to the appendix as is the opinion of the United States Court of Appeals for the Fifth Circuit on Petition for Rehearing rendered No-

vember 9, 1960 with dissenting opinion of Circuit Judge Cameron attached to appendix.

Jurisdiction

The judgment of the Court of Appeals was entered July 27, 1960. The jurisdiction of this Court is invoked under 28 U.S.C.A. 1254(1).

This is a case involving the laws of the States of Kentucky and Louisiana relative to contracts of sale and the interpretation of said statutes. The pertinent statute of the State of Kentucky is contained in Sections 361.010, 361.040 and 361.080 of the Kentucky Revised Statutes, which reads as follows:

Kentucky Revised Statute 361.010

"(1) A contract to sell goods is a contract whereby the seller agrees to transfer the property in goods to the buyer for a consideration called the price.

(2) A sale of goods is an agreement whereby the seller transfers the property in goods to the buyer for a consideration called the price."

Kentucky Revised Statute 361.040

"(1) A contract to sell or a sale of any goods or choses in action of the value of $500.00 or upwards shall not be enforceable by action unless the buyer shall accept part of the goods or choses in action

so contracted to be sold or sold and actually received the same or give something in earnest to bind the contract or in part payment, or unless some note or memorandum in writing of the contract or sale be signed by the party to be charged of his agent in that behalf.

(2) The provisions of this section apply to every such contract or sale, notwithstanding that the goods may be intended to be delivered at some future time . . . "

Kentucky Revised Statute 361.080

"(1) Where there is a contract to sell specific goods and subsequently but before the risk passes to the buyer, without any fault on the part of the seller or the buyer the goods wholly perish, the contract is thereby avoided."

The applicable statutes of the State of Louisiana are contained in Article 2471 of the Civil Code of said state which reads as follows:

"A sale, made with a suspensive condition, does not transfer the property to the buyer, until the fulfillment of the condition.

If the thing be destroyed before this happens, the loss is sustained by the seller.

If the thing be only deteriorated, when the condition is accomplished, the buyer has the choice eith-

er to take it in the state in which it is, or to dissolve the contract.

If it has undergone any improvement without the agency of the seller, the buyer has the advantage of this improvement, without having to pay any increase of price."

Questions Presented

Whether the Trial Court and the Fifth Circuit Court of Appeals erred in finding an oral contract which violated the statutes of both Louisiana and Kentucky, when in truth and in fact no such oral contract was sustained by the record, there having been an agreement between the parties, that is, the appellant and appellee, that any negotiation entered into between them would be reduced to a written contract. The finding of the District Court and the opinion of the Fifth Circuit Court of Appeals interprets the statutes of Louisiana and Kentucky at variance with the decisions of other circuits as well as the opinions of the Fifth Circuit Court of Appeals in other matters involving contracts to be reduced to writing. The opinion of the Fifth Circuit Court of Appeals is in diametric opposition to its own finding in the case of *First National Bank & Trust Co. of Vicksburg, Miss. v. The Seneca*, 179 F. Supp. 847, where that court held:

"Where parties contemplate execution of act of sale or deed to property, title does not pass on exercise of option to purchase; this is particularly true where arrangements respecting the purchase money are yet to be made".

Unless by writ of certiorari and review the Supreme Court of the United States decides the question involved in this case in accordance with the statutes of Louisiana and Kentucky, the appellant will be deprived of equal protection of the laws as set out in the Constitution of the United States, and, further, he will be deprived of his property without full due process of law in that he has been deprived of his rights as evidenced by other opinions of the Circuit Courts of Appeals in the United States.

Statement

This is an action brought by Llewellyn Sharp, IV against James E. Courtin for the sum of Six Thousand and No/100 ($6,000.00) Dollars alleging that the said James E. Courtin purchased from him a racing colt by Devil Diver out of Bill's Marge and that the said Courtin failed and refused to pay him. The record shows that on May 18, 1956, Courtin signed a contract to purchase the colt from Sharp and mailed same to Sharp's attorney, who received it on May 21, 1956. On May 20, 1956, the colt broke its neck and died. Payment was stopped on a check forwarded in part payment of the purchase price by Courtin on May 21, 1956, and on February 11, 1958 Sharp filed suit in the United States District Court for the Eastern District of Louisiana to recover the sale price.

Page 37 of the record shows that the parties agreed to reduce any agreement between them to writing, and on page 38 of the record, Sharp admits that he went to his attorney's office, asked that a written contract be drawn and forwarded to Courtin for signature. No signed contract by Sharp was ever placed in Courtin's hands.

Page 45 of the record contains Sharp's testimony that the first time he knew Courtin had signed a copy of the written agreement was on Monday, May 21, 1956. This was a day after the colt died. He also testified he received no payment in whole or in part until that date.

The United States Court of Appeals agreed with the Trial Court's finding that there was a contract between the parties enforceable against Courtin.

Reasons for Granting the Writ

It is respectfully submitted that the Court of Appeals for the Fifth Circuit has rendered a decision in conflict with other decisions of other courts on the same or similar matters, as well as a decision in conflict with its own former decisions. It has, by its decision, caused an injurious result to Courtin and this Honorable Court has the power given to it to bring before it for decision by certiorari a conflicting opinion which it may reverse in order to effect uniformity of rulings throughout the United States in a matter of contracts which is always grave and important. It is desirable that there be no conflict of decision, particularly in contract matters where a party to a suit may be deprived of equal protection of the laws and be deprived of his rights and property. It is submitted to your Honors that the case of *Warner vs. New Orleans*, 167 U.S. 467, 42 L. Ed. 239 is applicable and gives to this Honorable Court the right to grant the applied for writ of certiorari and review.

It was held in the case of *Ex parte Lau Ow Bew*, 12 S. Ct. 45, 141 U.S. 583, 35 L. Ed. 868 that:

> "Jurisdiction to review by certiorari should be sparingly exercised, and only in cases of peculiar gravity and general importance, or in cases affecting relations with foreign governments, *or to secure uniformity of decisions.*"

Although certiorari is a discretionary writ which may or may not be granted by the Supreme Court of the United States it has been granted by the court in matters involving the validity of contracts, said contracts having been erroneously interpreted and not in accord with State statutes. In the instant matter, we have the statutes of both Kentucky and Louisiana, herein quoted, violated by the decision of the District Court and the United States Court of Appeals for the Fifth Circuit. It was held in *Whitfield vs. Aetna Life Insurance Company, 205 U.S. 489, 51 L. Ed. 895,* as follows:

> "The writ of certiorari was granted upon the application of the plaintiff in the court below * * * the question presented being the validity of a provision in a life insurance policy in view of the state statute."

A further reason for the granting of this writ of certiorari is the fact that the Judges of the Fifth Circuit Court of Appeals differed on the petition for rehearing where Circuit Judge Cameron dissents and writes a dissenting opinion in which he says "*that the judgment of the lower court should be reversed and judgment rendered in favor of appellant, Courtin.*" Thus, we have a conflict on the interpretation of questions of law even within the court itself since Judge Cameron says that the case presents only a question of law.

"Sharp's lawyer, therefore, drew up a contract in which, as a matter of law, all prior negotiations were merged."

At no time could Courtin have enforced performance of the contract signed by him, nor could he ever have recovered damages had Sharp refused to deliver a living colt. This is added reason for the granting of this writ of certiorari since Courtin did not have equal protection of the laws of his own state or those of Kentucky. Article 2471 of the Civil Code of the State of Louisiana, the statute involved in this case was interpreted by the Supreme Court of Louisiana in the case of *Breaux Brothers Construction Co. v. Associated Contractors, 77 So. 2d 17.* This is the ruling case in Louisiana on the interpretation of the article of the Civil Code and the case holds that a contract to be reduced to writing must be executed by all the parties before it is enforceable by any party. We have already quoted the decision in the Seneca case which decides as did the Breaux case that the act of sale had to be executed by all parties, otherwise title did not pass. It will be recalled that this is a decision of the Fifth Circuit Court of Appeals for the United States of America. This decision is entirely opposite to the opini reached in the case by that Honorable Court.

If the decision of the lower courts is permitted to stand, there will be a conflict which can not be resolved unless and until a higher court decides the question. It is not desirable or healthy for such a situation to exist. It would be impossible should the decision stand to pass upon the validity of any agreements between any parties whose ultimate desire is to contract for the sale of an object. No lawyer or judge could answer to a client who placed before him a

controversy where a contract was to be reduced to writing between the parties in the face of the decision as it now stands in the lower courts.

It is therefore respectfully submitted that your Honors should grant a writ of certiorari and review of the judgment of the court below so that any conflict of law may be finally resolved by an opinion of our highest tribunal.

Respectfully submitted,

James E. Courtin

James E. Courtin
Attorney for Appellant
840 Saratoga Building
New Orleans, La.

CERTIFICATE

I hereby certify that a true copy of the above and foregoing petition for writ of certiorari was served upon Llewellyn Sharp, IV by delivering a true copy to Hon. David C. Treen, his attorney, this 16th day of December, 1960.

James E. Courtin

James E. Courtin

APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOF THE FIFTH CIRCUIT

No. 18223

JAMES E. COURTIN,
Appellant,

versus

LLEWELLYN SHARP, IV,
Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana

(July 27, 1960.)

Before RIVES, Chief Judge, and CAMERON and BROWN, Circuit Judges.

RIVES, Chief Judge: This action was for $6,000.00, the purchase price of a yearling colt ("by Devil Diver out of Bill's Marge") allegedly sold by Sharp to Courtin. Before actual delivery and while the colt was still in Sharp's

paddock it was accidentally killed.[1] No issue of negligence in the care of the colt was made, but Courtin's sole defense was that, at the time of the colt's death, title to the colt had not passed to him with the consequent risk of loss.

Sharp was a breeder of race horses on a farm near Lexington, Kentucky. Courtin was a lawyer resident in New Orleans who owned several horses and was interested in acquiring a colt sired by a stallion named "Devil Diver." Courtin asked two friends of his who were to attend the Kentucky Derby of May 5, 1956, to be on the lookout for such a colt. According to Sharp, one of Courtin's friends actually agreed on the purchase of the colt for Courtin at a price of $6,000.00 to be paid in cash. Courtin's friends denied any actual purchase at the time of their visit to Sharp's farm. Courtin and his friends all testified that Courtin had not authorized any purchase of the colt, but admitted that its purchase was recommended to Courtin. One or two days following the visit of Courtin's friends to the Sharp farm, Sharp made a long distance telephone call to Courtin. Their testimony as to this conversation is diametrically opposed. Sharp's version of that conversation was as follows:

"Q. Well, did you discuss price or delivery or any other terms at that time?

---

[1]Mr. Sharp testified:

"This Devil Diver yearling was turned out in the paddock. It was in the morning and for some reason he stuck his head between two boards in a board fence that enclosed his paddock, and a fly bit him or something, and scared him, and he jerked back and it broke his neck right behind the head, and he fell right down. I was sitting on my front porch at the time it happened and saw it as it happened. And I ran in and called for the veterinary and he came right out; but he proflounced the colt dead when he got there."

"A. Mr. Courtin was already informed of the price of $6,000.00 and he asked me would I keep the colt at the farm and board him for him for two or three months until he came up to pick up some more horses that he said he was going to buy. I told him that since he was sending me my check right off, that I wouldn't charge him for boarding his horse for a couple of months, that I would keep him up there without charging him anything; and he asked me to be sure that I took care of his horse in the same manner that he had been receiving, and I told him that I would.

"Q. Can you give us the approximate date of this telephone conversation?

"A. Approximately the 4th or 5th of May.

"Q. Did not Mr. Courtin indicate to you during his telephone conversation that he hadn't made up his mind about the colt, he wanted to think about it?

"A. No, sir, he very definitely said he bought the colt, and that my check would be in the mail that day."

On the other hand, Courtin testified:

" . . . Mr. Sharp phoned me and asked me about the horse, whether I was buying him or whether I was not buying him; and I told him I didn't know whether I would or I wouldn't until such time as I saw some pictures that had been taken of the horse by Mr. Gruber and his wife. Sometime after that, I'm a little ahead of my story.

In that same conversation, Mr. Sharp told me that he would not take less than $6,000.00 for the horse. I told him that I would let him know something after I saw the pictures . . . "

Four or five days later, Sharp again called Courtin by long distance telephone. That second telephone conversation, according to Sharp, was in substance as follows:

"Well, several days had gone by and I hadn't received any check and I called him to see what was the delay in sending the check. He said that for me not to worry, that he had bought the horse, that he was just a little close on financial things at the time, but that he would send the check; and he asked me would I let him pay for it part of it then and part of it later. And we came to an agreement that I would accept $2500.00 at the time and within ninety days or sooner, he would pay the balance of $3500.00. So at that time I told Mr. Courtin if I was going to accept partial payment and then the balance later, that I would require a board bill for the time that I kept his colt at the farm, and I told him that I would take Eighty Dollars a month to board his horse; and he agreed with that."

Again, Courtin's version was different:

" . . . I think about the 10th or 11th of May, Mr. Sharp phoned me again. I had seen the still pictures at that time and I was interested in the colt, and I told Mr. Sharp at that time that I thought

I would probably buy him, provided several things. One was that he would be paid part cash and the remainder at the end of ninety days, and that I would want the colt boarded at his place, since the colt had been raised there, until I had him picked up for training purposes; and he told me he would charge me $80.00 a month for that service. I told him then to draw up contracts, or have his attorney do it, and mail them to me and if the contracts were satisfactory, I felt sure I would buy the colt . . . "

Following this second telephone conversation, Sharp had his attorney draft a contract between Sharp as "party of the first part" and Courtin as "party of the second part," which provided as follows:

> "That for and in consideration of the sum of One ($1.00) Dollar cash in hand paid and other good and valuable consideration, the receipt of which is hereby acknowledged, the party of the first part sells to the party of the second part as of May 5, 1956, one yearling by Devil Diver out of Bill's Marge, which yearling is dark brown in color with a white stripe on its face, upon the following terms and conditions:
>
> "(1) The purchase price is in the amount of Six Thousand ($6,000.00) Dollars of which the sum of Twenty-Five Hundred ($2500.00) Dollars is paid to first party by the second party at the time of the signing of this agreement, the receipt of which is hereby acknowledged.

"(2) The balance of Thirty-Five Hundred ($3500.00) Dollars is to be paid within ninety (90) days of the date of this contract.

"(3) The first party retains possession of said yearling and the first (sic) party is to pay to first party the sum of Eighty ($80.00) Dollars per month as board. Prior to the time said yearling is removed from the custody and possession of first party second party agrees to pay the additional sum herein referred to in paragraph No. 2."

Sharp's attorney mailed two unsigned copies of that contract to Courtin, accompanied by a letter stating:

"At the request of Mr. Llewellyn Sharp, IV, I have prepared a contract with reference to the yearling you purchased from him. Would you be kind enough to execute this contract and return it to me with your check for $2500.00 and I will return your copy."

Sharp and his attorney and the attorney's secretary testified that Sharp signed a third copy of the contract and left it with the attorney. That fact, however, is not shown to have been communicated to Courtin prior to the colt's death.

On Friday, May 18, 1956, Courtin signed the two copies of the contract which he had received, had his signature witnessed by his secretary, and deposited them in the mail addressed to Sharp's attorney, together with his check

payable to Sharp in the sum of $2,500.00. The copies of the contract signed by Courtin and Courtin's check were not received by Sharp's attorney until Monday morning, May 21, the day following the death of the colt.

Sharp's attorney further testified:

> " . . . Following the receipt of the check and writing, Mr. Sharp came to the office and at his request I placed a phone call to Mr. Courtin, care of his office, Northern Bank and Commerce Building, New Orleans, Louisiana. I introduced myself to Mr. Courtin, after a person representing himself to me to be Mr. James Courtin, responded to my call, and advised him that Mr. Sharp wished to talk to him. Mr. Sharp went to the library and talked from an extension phone and I overheard the entire conversation. The conversation, as I recall it, was as follows: Mr. Sharp advised Mr. Courtin that the 'Devil Diver' yearling which he had purchased from Mr. Sharp had broken his neck the day before. Mr. Courtin advised Mr. Sharp in substance that things like that happen every day, but not to worry about it since he, Courtin, had bought the horse and would pay for it, and further that he had it insured anyway. He further advised Mr. Sharp that he would send him the balance of the purchase money very shortly. This concluded the conversation between Mr. Sharp and Mr. Courtin."

Sharp himself testified as to that phone conversation a follows:

"I called or I talked with Mr. Courtin, Mr. Shouse placed the call, but I talked with him from the phone in Mr. Shouse's library, which is an extension phone, and informed him of the colt's death, and he said, 'Don't worry about it. It happens all the time. I have the colt insured. I'll send your money. Send me a death certificate.' I was upset about the thing, I was trying to cultivate Mr. Courtin as a future customer and I was very much more downcast about it than he was, and he told me several times, 'Just don't worry about it, just send me the death certificate and forget about it. I have the horse insured, and its alright.' That was about all of our conversation."

Courtin's version of this last telephone conversation is materially different:

". . . . On Monday morning, I was notified that the colt had been killed that Sunday morning, May 20, and that conversation was a conversation between Mr. Sharp and myself. Whether it came from Mr. Shouse's office, or where it came from, I do not know; but I did not tell Mr. Sharp or anyone else that I had the horse insured, because I didn't. I couldn't insure a horse because there is one rule that the insurance companies have relative to the insuring of horses — and that is, they will not insure a horse without the foal paper registered in your name, and I did not have foal papers and could not possibly have insured the horse; and I think Mr. Sharp knows that. I told him nothing about insurance and nothing about send-

ing any further money to him. I expressed my sympathy about the fact that so beautiful a little colt had been killed, and that was the sum and substance of that conversation . . . "

Courtin then stopped payment on the $2,500.00 check. Nearly a month later, under date of June 19, 1956, Sharp wrote to Courtin as follows:

> "After I advised you by telephone on about the 21st day of May, 1956, that the colt I sold you had been killed, I have not heard from you. Mr. Shouse delivered to me your check for $2,500.00 which I deposited on about the 6th day of June 1956. This check was returned to me on the 14th day of June.
>
> "I feel that at the time this colt died he belonged to you. I could have cashed your check and not told you about the colt's death, but I felt that you should know, so I called you. I would like some answer from you as to what your feeling is about this loss."

Courtin did not respond to that letter. A year and a half later, on January 17, 1958, this action was filed.

The district court entered a full written, but unreported, opinion in which it treated the case as turning on one disputed issue of fact: "that is, did the defendant, as purchaser, attach to his acceptance the condition that he should first see moving pictures of the colt before the deal was closed?"

The district court's opinion concluded as follows:

> " . . . The sole proof on the point is the testimony of defendant on the trial, which is vigorously contradicted by plaintiff. The latter is supported by the written document or *contract* signed by defendant and returned to plaintiff May 18th, two days before the colt was killed, and, in doing so nothing was said about the alleged condition but, as stated earlier, express provision was made for plaintiff to 'board' the colt for defendant at the price of $80.00 per month. In such circumstances, it is believed that, at best, defendant's sole testimony is offset by that of plaintiff, while the written contract, one copy of which plaintiff swore he had signed when the two were sent to and signed by defendant (one for each of the parties) in the presence of a witness, and the original mailed to plaintiff on the date stated.
>
> "The sale was, therefore, complete by the meeting of the minds of the seller and purchaser on all essential and expressed terms of the agreement. Sec. 361.190 Kentucky Revised Statutes, Louisiana Civil Code Article 2467.
>
> "Plaintiff should have judgment as prayed for."

It is not necessary for us to decide whether the written contract had been sufficiently executed and delivered prior to the death of the colt, for under the testimony credited by the district court there was a completed verbal sale of

the colt by telephone conversation between Sharp and Courtin.

Whether that verbal agreement be considered a Louisiana contract or a Kentucky contract, it is conceded that the risk of loss follows the title. See Section 361.190 Kentucky Revised Statutes; Louisiana Civil Code, Articles 2467, 2456.

Courtin urges, however, that "no title was transferred because an agreement was to be reduced to writing, signed by the parties, and this was not done." Citing, *Breaux Brothers Construction Co. v. Associated Contractors*, La. 1954, 77 So. 2d 17.

Sharp agrees that whether the verbal agreement takes effect as a complete contract at once, or only when a formal written contract is executed, depends on the intention of the parties. Citing and quoting from 17 C.J.S. Contracts, §391; *Mermelstein v. Schwab*, C.A., La., 1953, 64 So. 2d 37; and a commentary in 15 Louisiana Law Review P. 824.

Clearly, under all of the authorities, the matter is one of intention. There was ample evidence to sustain the findings, at least impliedly made by the district court, that the sale of the colt was completed as of a date earlier than its death, and that there was no intention to suspend or condition the sales agreement upon the subsequent execution of the written contract.

The judgment was right and it is

AFFIRMED.

CAMERON, Circuit Judge, concurs in the result.

A true copy

Test: EDWARD W. WADSWORTH

Clerk, U. S. Court of Appeals, Fifth Circuit

By_____
Deputy
NOV 22 1960
New Orleans, Louisiana

(SEAL)

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18223

JAMES E. COURTIN,
Appellant,

versus

LLEWELLYN SHARP, IV,
Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana.

(November 9, 1960.)

ON PETITION FOR REHEARING

Before RIVES, Chief Judge, and CAMERON and BROWN, Circuit Judges.

PER CURIAM: The petition for rehearing in the above-styled and numbered cause is hereby

DENIED.

CAMERON, Circuit Judge, Dissenting:

The doubts which I entertained at the time I concurred in the result announced in the original opinion have, under the petition for rehearing, ripened into a conviction that the judgment of the lower court should be reversed and judgment rendered in favor of appellant Courtin.

I agree that the case presents only a question of law. As is true with respect to all written contracts, the parties in advance thereof agree either orally, or in writing, or both, upon the terms which will go into the written contract. That is what happened here. Sharp himself wanted the oral negotiations to be put into writing because a part of the money was not then to be paid by Courtin. Sharp's lawyer, therefore, drew up a contract in which, as a matter of law, all prior negotiations were merged. It is clear to me that the written contract into which the parties had agreed to merge everything which had passed between them could not, as a matter of law, become effective until each party had signed and delivered a copy of the written contract to the other.

This had not been done when the colt died. Courtin signed a copy of the contract and sent it to Sharp's lawyer. Sharp received it after the colt's death. There is testimony that Sharp had already signed a copy and delivered it to his lawyer. That could not, in my opinion, be construed as delivery to Courtin. As far as the record shows, no copy of the writing was ever delivered to Courtin. There was never a time, therefore, when Courtin could have enforced performance of the contract or recovered dam-

ages for its breach. A contract lacking in mutuality is not enforceable by either party.

Since these facts appear in the record without dispute, I think the contract is unenforceable for lack of mutuality. I think, moreover, that the statutes of fraud of both Kentucky and Louisiana require such a contract as this to be in writing, but I do not find it necessary to reach that question.

For the reasons stated, I respectfully dissent from the action of the Court in enforcing this contract.

A true copy

Test: EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals, Fifth Circuit

By: CLARA R. JAMES
Deputy
New Orleans, Louisiana

NOV 22 1960

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18223

JAMES E. COURTIN,
Appellant,

versus

LLEWELLYN SHARP, IV,
Appellee.

ON CONSIDERATION OF THE APPLICATION of the Appellant in the above numbered and entitled cause for a stay of the mandate of this court therein, to enable Appellant to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, IT IS ORDERED that the issue of the mandate of this court in said cause be and the same is stayed for a period of thirty days; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within thirty days from the date of this order there shall be filed with the clerk of this court the certificate of the clerk of the Supreme Court that certiorari petition and record have been filed. It is further ordered that the clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of thirty days from the date of this order, unless the above-mentioned certificate shall be filed with the clerk of this court within that time.

DONE AT NEW ORLEANS, LA., this 18th day of November, 1960.

(Signed) RICHARD T. RIVES
United States Circuit Judge.

(ORIGINAL FILED NOVEMBER 18, 1960)

JUDGMENT

Extract from the Minutes of July 27, 1960.

No. 18223

JAMES E. COURTIN

versus

LLEWELLYN SHARP, IV.

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of

the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellant, James E. Courtin, and the surety on the supersedeas bond herein, Thelma F. Coffin, be condemned, in solido, bo pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

"Cameron, Circuit Judge Concurs in the Result."

FILE COPY

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JAMES R. BROWNING, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 591

JAMES E. COURTIN,

Appellant,

versus

LLEWELLYN SHARP, IV,

Appellee.

BRIEF IN OPPOSITION TO APPELLANT'S PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 591

JAMES E. COURTIN,

Appellant,

versus

LLEWELLYN SHARP, IV,

Appellee.

BRIEF IN OPPOSITION TO APPELLANT'S PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Although it is not quite clear from the brief of the petitioner, it appears that he is urging the granting of certiorari on the basis of the following portions of Supreme Court Rule 38(5)(b):

> "Where a circuit court of appeals has rendered a decision in conflict with the decision of another circuit court of appeals on the same matter; or has decided an important question of local law in a way probably in conflict with applicable local decisions; . . ."

Petitioner, on pages 4 and 6 of his brief, states that the decision of the Court of Appeals for the Fifth Circuit is in conflict with decisions of other circuits. Yet the petitioner cites no case in any of the other circuits with which the decision in this case is allegedly in conflict. Furthermore, the petitioner does not indicate in what way the decision of the Fifth Circuit Court of Appeals has varied with the jurisprudence of any other circuit.

The only other basis for certiorari which would conform with the rules of this Court is that an important question of local law has been decided in a way probably in conflict with applicable local decisions. Again, the petitioner fails to show how this decision is in conflict with local decisions either of Kentucky or of Louisiana. Before getting into details of this question, however, we submit that the case is *definitely* one involving factual appreciation and findings, and that the case could be decided either way without actually conflicting with the jurisprudence of either Kentucky or Louisiana. Thus, no *important* question of local law is presented. The case involves the principal amount of $6,000; it has been thoroughly considered by the District Court and by the Fifth Circuit Court of Appeals by means of original briefs and by briefs in support and opposition to petition for rehearing.

Both the District Court and the Fifth Circuit Court of Appeals found that the facts definitely supported the conclusion that the plaintiff and defendant had completed an oral contract of sale of the colt in question.

The record will reflect that there were several telephone conversations between the two parties with respect to the colt. It was the position of the plaintiff Sharp, and he so testified, that an agreement on all particulars for the sale of the colt was reached during the first of these several conversations. It was during a subsequent conversation, according to Sharp, that a discussion of the written agreement arose due to the fact that the purchaser of the colt, Courtin, wanted to defer payment and wanted to board the colt at the seller's farm for several months. If, as a matter of fact, a verbal agreement had been concluded during the first conversation, any discussion at a later date that the contract be put in writing would have no effect upon the validity of the prior confected oral contract. Even if the verbal agreement were not completed until the subsequent telephone conversation, the fact that the parties discussed a memorandum of agreement, or the fact that they agreed that such a memorandum would be drafted, does not *ipso facto* mean that the contract was not to be considered executed until the memorandum was prepared. The question is one of intention of the parties concerned. The District Court and the Court of Appeals both decided there was no intention by the parties to suspend or to condition the sale upon the subsequent execution of something in writing. The last two paragraphs of the opinion of the Court of Appeals summarizes this point and states that "there was ample evidence to sustain the findings . . . that the sale of the colt was completed as of a date earlier than its death . . .".

Thus, we have a finding of fact, amply supported by the record. The only *legal* question presented is the

effect of that finding of fact. The jurisprudence of all jurisdictions concerned is uniform in adhering to the principle that an agreement to reduce a contract to writing does *not* suspend the effectiveness of that contract if the parties intend to be bound at the moment of verbal agreement. The decision cited by petitioner on page 8 of his brief, *Breaux Brothers Construction Company v. Associated Contracts*, 77 So. (2d) 17, is in complete harmony with this principle.

Manifestly, we submit, it would be incumbent upon petitioner to obtain a reversal of the findings of fact on the question of intention before he could hope for any change in the judgment of the District and Appellate Courts.

The petitioner cites, on pages 2, 3 and 4 of his brief, certain of the Kentucky Revised Statutes and Articles of the Civil Code of Louisiana. He contends that the contract "violated the statutes of both Louisiana and Kentucky . . ." (Page 4.) The petitioner does not state exactly how any of these statutes have been "violated."

The reference to the Kentucky Revised Statutes, however, suggests that petitioner may be contending that the oral contract is not enforceable because the value of the thing in question exceeds $500. In answer to any such contention we submit, first of all, that there was an actual acceptance by the purchaser of the thing contracted to be sold. There is no dispute between the parties about the fact that the colt was to be boarded at the seller's farm for a period of three months. This being so, the seller actually became the bailee of the purchaser and

in that capacity he received and "accepted" the thing contracted to be sold.

Secondly, it was admitted that the seller mailed his check in the sum of $2,500, which was part payment, prior to the death of the colt. This part payment satisfies the requirements of the Kentucky statute concerned.

Thirdly, there was a note or memorandum signed by the "party to be charged." There is no dispute about the fact that the purchaser signed a written memorandum and deposited it in the mail prior to the death of the colt.

The purpose of Kentucky Revised Statute 361.040 is clear: to require certain additional evidence, in the case of verbal contracts in excess of $500, other than the mere testimony that a verbal agreement took place. Several, if not all, of the evidence requirements set forth in that statute have been met in this case.

The petitioner also quotes Kentucky Revised Statute 361.080. This section is clearly not applicable because we are not concerned with "a contract to sell," but with an actual "sale."

The petitioner then refers to Article 2471 of the Civil Code of Louisiana, which is concerned with sales made with suspensive conditions. We have no quarrel whatsoever with this provision of law, but under the findings made by the District and Appellate Courts there was no suspensive condition involved in the transaction.

While it is not altogether clear that the law of Louisiana should apply or the law of Kentucky, the ques-

tion has only academic interest because the decision below was in perfect harmony with the jurisprudence of both jurisdictions.

In conclusion, we respectfully submit that the basic issue in this case is one of fact and that fact has been determined adversely to the petitioner. There is no important local question of law involved and there is no showing whatsoever that the decision of the Court of Appeals is in conflict with those of other circuits, or with applicable local jurisprudence. We request, therefore, that the petition for writ of certiorari be denied.

Respectfully submitted,

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CERTIFICATE.

We hereby certify that a true copy of the foregoing brief was served upon the petitioner, James E. Courtin, by delivering a copy to him this day of January, 1961.

DAVID C. TREEN &
GEORGE R. BLUE.